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Supreme Court of the United States

October Term, 1954.

No. 113

FRANK DOLMAGE,

Petitioner,

vs.

CHICAGO, ROCK ISLAND and PACIFIC RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Respondent has stated some additional facts which we think in no way add to the presentation of the petition to this Court. Some of the arguments which defendant makes are, however, absolutely unfair. For example, on page 7 of its brief it contends that to hold the respondent liable would be to make it an "insurer" of the safety of its employees. On page 4 respondent contends that it was petitioner's contention below that it was the duty of the respondent to "floodlight" the railroad yard where the bunkhouse was situated for the reason which it stated on page 12 that "someone might choose to go there". We object to such unfair argument not because we are unable to answer it, but for the reason that such misstatement of our position is not only unfair but is an obstruction to the ascertainment of truth and of a fair and forthright presentation to this Court of the petition for a writ of certiorari.

See:

New York Central R. Co. v. Johnson, 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706.

I.

Respondent makes no effective answer to petitioner's contention that it was respondent's duty to provide light in the railroad yard in question.

Petitioner points out in his main brief that it is the duty of a railroad company under the *Federal Employers' Liability Act* to provide artificial light where there otherwise would be danger of injury to its employees. Petitioner cited in support of that contention the following cases:

Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140;
Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740;
Armenia v. Wyer, 2 Cir., 210 F. 2d 592;
Boston & M. R. R. v. Cabana, 1 Cir., 148 F. 2d 150;
Luthy v. Terminal R. Ass'n of St. Louis (Missouri 1951), 243 S. W. 2d 332.

All these cases involved the duty to light railroad yards. Petitioner also cited many cases involving the duty of persons and corporations other than railroad companies to provide artificial light where there otherwise would be danger of injury.

See:

Petitioner's Brief, pp. 18-19.

As said in *Taylor v. Texas & N. O. R. Co.*, (La. App.), 22 So. 2d 771, 773, where a railroad company provided an employee with a pushcart but with no lights on it to warn other traffic when it was dark, which thus exposed the

employee using it to danger of injury, and where the Court said (22 So. 2d 773):

> "The standard by which the negligence charged against the defendant in this case is to be measured is not by any of the provisions of that statute, but rather by its conduct in its relation with the plaintiff who alleges that he was its employee, under the particular circumstances set out by him and which he alleges gave rise to the accident and his resulting injuries. That standard by which it is to be judged in determining whether it was negligent or not, is the care and prudence which an ordinarily prudent person would exercise under similar circumstances. If they did furnish him with a push-cart with which to carry the mail it would seem that the standard required that they furnish him with one that was equipped with all that was necessary in order for him to safely operate it on a public highway. If equipping it with lights tended to promote his safety and their failure to do so was the proximate cause of the accident, as he has alleged, then he has set out a cause of action."

The verdict of the jury established as a fact that respondent's failure to light was a breach of legal duty to petitioner which exposed him to danger of injury and was the cause of the injuries which he sustained.

Dice v. Akron, Canton & Youngstown R. R. Co., 342 U. S. 359, 96 L. Ed. 398, 72 S. Ct. 312;

Lavender v. Kurn, supra.

See:

Petitioner's Main Brief, pp. 21-22.

Respondent cites no cases which are in point and which hold to the contrary. Respondent's main effort in its brief has been to distinguish the cases cited by petitioner in his main brief. We deferentially submit that

the distinctions attempted to be made relate to matters which are wholly immaterial and in no way controlling.

II.

Respondent's contention that to hold it liable in this case would impose upon it the duty of an insurer is absolutely without merit.

We do not deem it necessary to labor this point for the reason that on page 7 of its brief, respondent in effect admits that this Court repudiated that contention in the case of *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497, where this Court in answering the contention there made by the railroad that the *Federal Employers' Liability Act* does not make the railroad company "an absolute insurer against personal injury damages suffered by its employees", said (336 U. S. 61):

> "That proposition is correct, since the Act imposes liability only for negligent injuries."

There is no more basis for defendant's contention that liability here would make it an insurer than there would be in the numerous other cases where similar liability was imposed upon other employers and other persons such as landlords and the like.

See:

Petitioner's Main Brief, pp. 15-18, and especially the cases cited in *Crawford v. Duluth, Missabe & Iron Range Railway Co.*, cited on page 15 thereof.

III.

Respondent's contention to the effect that petitioner was guilty of contributory negligence as a matter of law because he failed to provide himself with a flashlight amounts to an assertion that petitioner was guilty of contributory negligence for failure to discharge respondent's duty to light the yards.

We have already discussed this point adequately in subdivision II of our main brief at pp. 20-21 thereof. Respondent cannot evade its duty to provide light for the safety of its employees by shifting the burden of performing that duty upon the employees themselves.

Respondent cites cases which clearly are not in point. None of them involves a question of injury due to failure to light or even the question of the duty of a railroad company to light premises for the safety of its employees.

The case of *Reynolds v. Atlantic Coast Line,* 336 U. S. 207, involves the question of whether defendant's negligence in allowing canes to grow alongside the roadbed was the proximate cause of a brakeman's death caused by his climbing between the cars to get from one side of the track to the other. No question of lighting was there involved.

The case of *Great Northern Ry. Co. v. Wiles,* 240 U. S. 444, involves the question of whether a brakeman, whose duty was to put out flares when a train stopped, was guilty of contributory negligence by reason of the fact that a train which was following collided with the one on which he was working. The Court held that his failure to put out the flares was contributory negligence.

The case of *Gill v. Penn. R. R. Co.,* 201 Fed. 2d 718,

involved the question of whether the defendant was negligent by reason of the fact that it permitted an employee with a stiff leg to work in a place where he might stand up and receive a bump on the head. The Court held that the defendant was not negligent. This case also involved no question of lighting.

The case of *Wolfe v. Henwood,* 162 Fed. 2d 998, involved a case of where an employee set fire to himself by slapping his mitts against his oil soaked clothes. This was held to be contributory negligence as a matter of law. No question of duty to light was there involved.

Respondent itself admits that the case of *Atlantic Coast Line v. Craven,* 185 Fed. 2d 176, does not involve a question of lighting. That in itself shows that the case is not in point.

As we stated in the introduction, defendant has entirely misrepresented petitioner's position with respect to what lighting was required. Respondent says in its brief that petitioner would require respondent to floodlight the entire yard area. This is a positive misstatement of petitioner's position. He contended simply that some light should be provided—enough light so that he could see to walk from the bunkhouse to the place where he went to eat his meals. The stringing of a wire and bulbs would have done the job. It is doubtful that this would have cost more than $75.00 or $100.00. The lights so strung could be turned on and off as needed. The installation thereof would not be an undue hardship on respondent or any employer similarly situated. At most, that would present a question of fact for the jury and that already has been answered in the affirmative in favor of petitioner and against respondent.

IV.

Respondent's argument that petitioner was not an employee at the time of his injury presents a separate ground for the granting of certiorari in order to have this court settle the rule with respect to the matter in view of the conflict of decisions in the courts of appeals in the second and tenth circuits and to settle the conflict with respect to the rule between the state court below and that of the Court of Appeals for the Tenth Circuit.

The Court of Appeals for the Second Circuit in the case of *Mostyn v. D. L. & W. R. Co.*, 160 Fed. 2d 15, in a very well considered opinion held that, where a railroad company provides a bunkhouse for the use of its employees, the employees using the bunkhouse sustain the relation of employee to the railroad during nonworking hours when they are going to and from the bunkhouse in connection with obtaining meals, food and the like. The Supreme Court of Minnesota has so ruled in the case of *Moore v. Minneapolis & St. L. R. Co.*, 123 Minn. 191, 142 N. W. 152, 143 N. W. 326, where the Court reviewed many cases, including its prior decision in *Rosenbaum v. St. Paul & Duluth R. Co.*, 38 Minn. 173, 36 N. W. 447, 8 A. S. R. 653. In the *Moore* case, *supra*, the Court said (123 Minn. 197):

> "This crew was furnished this caboose as a place in which to sleep, partly for their own convenience and partly for the convenience of the company. The usual leaving time of this train was 8 p.m. On the occasions when the men were obliged to take the train in sections from Des Moines to Waukee, they were on call and were subject to be called about 4 p.m. *There was clearly an invitation to the men to use this car for sleeping purposes as an incident to*

their employment. In such case they are employed while upon said car and while necessarily going to and from the same. This rule is sustained by principle and authority." (Italics supplied)

We believe that the Court of Appeals for the Second Circuit and the Supreme Court of Minnesota in the *Moore* case, *supra,* lay down the correct rule in well considered opinions.

The Court of Appeals for the Tenth Circuit held exactly to the contrary in *Atchison, T. & S. F. R. Co. v. Wottle*, 193 Fed. 2d 628.

We deferentially submit that the decisions of the Court of Appeals for the Second Circuit in the *Mostyn* case and the Supreme Court of Minnesota in the *Moore* case, both *supra,* lay down the correct rule in well considered opinions and that the Court of Appeals for the Tenth Circuit erred in the rule laid down by it. A choice will have to be made and we think that the choice should be made in favor of the rule as announced by the Court of Appeals for the Second Circuit and the Supreme Court of Minnesota. As a matter of fact, we think that the decisions of the Supreme Court of Minnesota show that the rule followed by that Court and by the Court of Appeals for the Second Circuit was "hornbook" law long before the *Federal Employers' Liability Act* was enacted and that the Congress must have so understood the rule when it enacted the *Federal Employers' Liability Act.*

We urge the Court for this additional reason to grant certiorari in order that the rule might be settled one way or the other.

CONCLUSION

We think that it is not sound public policy to have courts applying diverse rules in the adjudication of rights under the *Federal Employers' Liability Act*. For example, there is such diversity of rule with respect to the duty to light as between the court below and this court and the other federal courts whose decisions we have cited on the question of the duty to light. We also think that there is such diversity of rule and decision with respect to the question of whether under the circumstances existing when petitioner was injured as between the Court of Appeals for the Second Circuit and the Supreme Court of Minnesota on the other hand and the Court of Appeals for the Tenth Circuit on the other. This condition with respect to the administration of the *Federal Employers' Liability Act* seems to be a persuasive reason why this court should grant certiorari in the instant case.

Respectfully submitted,

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